92-1315

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOE B. SHANER and CYNTHIA K. SHANER,
Petitioners,

v.

UNITED STATES OF AMERICA and DOUGLAS G. DIETRICH,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

CHESTER T. KAMIN
Counsel of Record
C. STEVEN TOMASHEFSKY
EDWARD J. SEBOLD
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Counsel for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether an applicant for aid from the Farmers Home Administration ("FmHA"), who has met all the statutory, regulatory, and other conditions for receipt of that aid, has a property interest in the aid sufficient to be protectible under the Due Process Clause of U.S. Const. amend. V?

2. Whether the Court of Appeals improperly engaged in factfinding to support a legal argument raised sua sponte on appeal, as to which no discovery had been taken below?

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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

Joe B. Shaner and Cynthia K. Shaner,
Petitioners,
v.

The United States of America and
Douglas G. Dietrich,
Respondents.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

The Petitioners, Joe and Cynthia Shaner, request that this Court issue a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above titled proceeding on September 16,1992, rehearing of which was denied by the Court of Appeals on November 4, 1992.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 976 F.2d 990 and is included in the Appendix hereto, page App. 1a infra. The order denying rehearing is included in the appendix hereto, page App. 9a infra.

The Memorandum Decision and Order of the United States District Court for the Southern District of Ohio is unreported and is included in the Appendix hereto, page App. 11a infra.

JURISDICTION

Petitioners brought their claims in the United States District Court for the Southern District of Ohio, basing jurisdiction upon U.S. Const. amend. V and 28 U.S.C. §§ 1331 and 1346(b). The District Court denied the Petitioner' claims and entered judgment on October 1, 1991. Petitioners filed a timely notice of appeal on November 29, 1991.

On September 16, 1992, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgment.

On September 30, 1992, Petitioners filed with the Court of Appeals a timely petition for rehearing with suggestion of rehearing en banc. On November 4, 1992 the Court of Appeals denied the petition for rehearing. The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case was brought by family farmers whose approved Farmers Home Administration ("FmHA") emergency loans were wrongfully cancelled by the FmHA and who were obstructed from obtaining the prompt

administrative review required by law. By the time the FmHA granted review and reversed itself, Petitioners had lost their farm.

Petitioners Joe and Cynthia Shaner were Ohio farmers whose region was devastated by natural disaster and was declared eligible for federal disaster relief. Extensive crop destruction made it impossible for Petitioners to repay their farm loans, and their principal creditor instituted foreclosure proceedings.

Petitioners turned to the FmHA, an agency of the federal government, and applied for emergency loan assistance. On May 4, 1982, the FmHA certified that Petitioners were eligible for loans totalling $151,500 under two emergency loan programs. By letter dated May 12, 1982, the FmHA county supervisor, Douglas Dietrich, informed Petitioners that those loans "have been approved in the above amounts, subject to the availability of funds" (App. 53a). The

letter stated no further approval condition other than availability of funds.

Shortly thereafter, the FmHA executed other documents approving the loans. Those documents recited that the security for the loans was a "1st lien on 1982 crops." The FmHA then drew checks dated May 28, 1982 and payable to Petitioners in the loan amounts.

But the FmHA did not deliver those checks to Petitioners. On July 7, 1982, without first notifying Petitioners, Dietrich filed loan cancellation forms, reciting that Petitioners could not meet the security requirement. That determination was an error, based on Dietrich's incorrect application of both the Ohio commercial code and federal regulations governing FmHA

liens.[1/] It is undisputed that Dietrich's determination was erroneous.

On July 12, 1982, Dietrich by letter notified Petitioners of the cancellation, stating that FmHA could not obtain a first lien on the 1982 crops. Petitioners then met with Dietrich to request reconsideration. He rejected their request and failed to provide necessary information on how to exercise their mandatory right to appeal his decision. The FmHA's regulations (7 C.F.R. § 1900.56) required Dietrich to provide that information.

Without the previously approved FmHA emergency funds, Petitioners were unable to plant their 1982 crops and lost much of their land. Faced with the threat of liquidation,

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[1/] Ohio Rev. Code Ann. § 1309.31(B) (Uniform Commercial Code § 9-312(2)) and 7 C.F.R. 1941.60 (1982) both provide that a security interest given for new value in growing crops takes precedence over a crop lien given to secure an obligation due more than six months before the crops are planted.

they filed for relief under Chapter 13 of the Bankruptcy Code.

Petitioners contacted numerous FmHA officers in an attempt to obtain administrative review of Dietrich's erroneous decision. Their efforts were fruitless for nine months. Finally, in April, 1983, they were granted a hearing before an FmHA program specialist. Apparently with no investigation of the governing lien law, the program specialist rejected Petitioners' appeal and affirmed Dietrich's decision.

Petitioners next appealed to the FmHA's acting state director, who did investigate the lien-priority issue. Finding Petitioners' position to be correct, he "reinstated" Petitioners' loan application on May 25, 1983.

But that action came too late. In the ten-month period between Dietrich's cancellation and the reinstatement, Petitioners had lost so much of their land

and equipment that they were now unable to generate sufficient projected cash flow to qualify for the loans that had been approved the year before. Instead of rebuilding their farm with the FmHA's assistance, Petitioners lost their farm altogether.

Petitioners brought this action to recover damages caused by (1) the FmHA's erroneous cancellation of their previously approved emergency loans and (2) the FmHA's subsequent refusal to respond in a timely manner to their requests for an opportunity to appeal the cancellation decision. Petitioners asserted causes of action under the Federal Tort Claims Act ("FTCA") and the Fifth Amendment.[2/]

In the District Court, Petitioners argued that the FmHA breached its duty of due

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[2/] Petitioners originally sued the United States, the FmHA, and Dietrich. The District Court ruled that the FmHA is not an entity subject to suit and that the United States was the responsible party for the agency's actions. Petitioners do not challenge those rulings.

care by cancelling the previously approved emergency loans on the erroneous basis that the Petitioners had not met the FmHA's lien requirement. The District Court granted the defendants' "Motion to Dismiss, Or In The Alternative, For Summary Judgment," though the judgment did not specify the alternative upon which the court relied. The court held that the FmHA owed no duty of care in this case because the loans had not yet reached the "processing" stage, but rather were still in the "negotiation" stage. (App. 42a). The court reached that conclusion even though the loans had been approved and checks had been drawn to Petitioners' account.

Petitioners also argued in the District Court that the FmHA and its loan officer, Douglas Dietrich, had violated their Fifth Amendment right to due process by obstructing their efforts to obtain administrative review of the loan cancellation. The District Court rejected

Petitioners' Fifth Amendment claim, holding that they had failed to show a constitutionally protectible property interest in any FmHA loan. In the District Court's view, Petitioners had only a "unilateral hope, desire, or need for a FmHA loan," not a protectible claim of entitlement to the loan itself. (App. 51a).

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit. Petitioners argued they were deprived of two forms of property worthy of Fifth Amendment protection. First, Petitioners had a protectible interest in their legitimate expectation of receiving the emergency loans for which they had qualified and which had been approved. Second, Petitioners argued that even if their interest in the loans did not rise to a constitutionally protectible property interest, they possessed a constitutionally protectible property interest in their right

of access to the FmHA's mandatory administrative appeals process. Petitioners argued that they were deprived of both those property interests by Dietrich's refusal to apprise the Petitioners of their right under FmHA regulations to appeal an adverse decision and by the agency's nine-month-long refusal to grant them a hearing.[3/]

The Court of Appeals affirmed, holding that despite the evidence that Petitioners had met all the statutory and other requirements for receiving the emergency loans -- and despite the evidence that the loans had actually been approved -- their interest in the loans had not ripened into a property interest protectible under the Due Process Clause. The court held that the FmHA's discretion in determining whether to approve a loan application defeated any

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3/ In the Court of Appeals, Petitioners also argued that the District Court had erred in rejecting Petitioners' FTCA claim. Petitioners do not raise that argument here.

legitimate expectation Petitioners might have in actually receiving loan proceeds once their loans had been approved.

The Court of Appeals also rejected the Petitioners' claim under Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) that they had a protectible Fifth Amendment interest in their right of access to the FmHA's mandatory appeal process. The court ruled that even if Petitioners had a protectible property interest in the appeals process, they had failed to plead that the deprivation of their appeal rights had been caused by "gross negligence." The Court of Appeals raised that alleged pleading defect sua sponte. As the Government had never attacked Petitioners' complaint on that ground, the practical effect of the Court of Appeals' ruling was to deny Petitioners the opportunity to cure any such defect by amending the complaint or taking discovery relevant to the new issue.

REASONS FOR GRANTING THE WRIT

I.

In Holding That An Applicant For Government Assistance, Who Meets All Requirements For Receiving The Assistance And Whose Application Has Been Approved, Has No Constitutionally Protectible Property Interest In That Assistance, The Sixth Circuit's Decision Conflicts With Decisions Of Other Courts Of Appeal.

This case presents a significant Due Process Clause question as yet unresolved by this Court: does an applicant for government aid who has met all requirements for receiving that aid, and whose application has been approved, have an interest in that aid sufficient for protection under the Fifth Amendment Due Process Clause against deprivation without a timely hearing?

The Court of Appeals did not reach the merits of Petitioners' due process claim. Rather, the court held there was no cognizable property interest to protect, determining that applicants for, as opposed to actual recipients of, government aid have

no interest in that aid rising to a level protectible under the Fifth Amendment.

This Court on several occasions has left open the question whether an applicant for government aid has a protectible due process interest in that assistance. See Lyng v. Payne, 476 U.S. 926, 942 (1986); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 320 n.8 (1985); see also Gregory v. Pittsfield, 470 U.S. 1018, 1021 (1985) (O'Connor, J., dissenting from denial of certiorari) (state court's ruling that applicant for federal aid had no constitutionally protectible property right was "contrary to the weight of authority among lower courts"); Peer v. Griffeth, 445 U.S. 970, 971 (1980) (Rehnquist, J., dissenting from denial of certiorari) (commenting that the Court has never decided whether an applicant for government assistance has a constitutionally protectible interest in that assistance); see also Harper

v. Secretary of Health and Human Services, 978 F.2d 260, 263 (6th Cir. 1992) (the Supreme Court "has not determined whether applicants for monetary benefits" have an interest in those benefits protectable under the Due Process Clause).

The Sixth Circuit's blanket rule that an applicant has no protectible due process interest until the aid is received fails to distinguish situations where, as here, both (1) an application was granted subject only to satisfaction of certain conditions; and (2) the applicant in fact met those conditions. That key distinction has been recognized by several courts of appeal, which have held that a property interest sufficiently concrete to merit Due Process Clause protection arises when the objective criteria for government assistance have been satisfied. See, e.g., Daniels v. Woodbury County, 742 F.2d 1128, 1132-33 (8th Cir. 1984) (applicants who met the established

conditions for county relief had protectible property interest in the relief); Ressler v. Pierce, 692 F.2d 1212, 1215 (9th Cir. 1982) (class of applicants whom housing program was intended to benefit had a protectible property interest in the housing assistance); Holbrook v. Pitt, 643 F.2d 1261, 1278 n.35 (7th Cir. 1981) (applicants for housing assistance benefits who met the objective eligibility criteria had protectible property interest in those benefits).

The general rule established by this Court is that

> to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Lower courts following this teaching have concluded that applicants for government assistance who have satisfied the regulatory or statutory objective criteria for receiving

that assistance have a sufficiently legitimate claim of entitlement to invoke Due Process Clause protection if the aid is denied or revoked. See, e.g., Hoffman v. City of Warwick, 909 F.2d 608, 619 (1st Cir. 1990); Daniels v. Woodbury County, 742 F.2d 1128, 1132-33 (8th Cir. 1984); Ressler v. Pierce, 692 F.2d 1212, 1215-16 (9th Cir. 1982); Holbrook v. Pitt, 643 F.2d 1261, 1278 n.35 (7th Cir. 1981); Johnston v. Shaw, 556 F. Supp. 406, 412-13 (N.D. Tex. 1982). Here, the Court of Appeals' ruling that applicants for government aid have no constitutionally protected property interest in that aid conflicts with the decisions of other circuits.

This Court should resolve this significant open issue according to the majority view. Even though Petitioners were not deprived of federal aid they had actually received, they should be treated for Due Process Clause purposes as though they had a

cognizable entitlement. Their legitimate level of expectation had ripened to the point where any reasonable person would assume the loans would be funded.

Had Petitioners actually received the funds which they were promised and to which they were entitled, there could be no question that they had a constitutionally protectible property interest in the funds. Johnson v. Department of Agriculture, 734 F.2d 774, 782 (11th Cir. 1984). Here, Petitioners met all the statutory and regulatory requirements for receiving aid.[4/] Their loans had formally been approved subject only to two conditions for

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[4/] FmHA regulations provide that "FmHA's policy is to make loans to any otherwise qualified applicant." 7 C.F.R. § 1945.51. The regulations then list a number of objective criteria for eligibility: (a) the unavailability of credit from other sources (b) United States citizenship, (c) status as an established farmer, (d) operations in a disaster area, (e) qualifying losses, (f) legal capacity, (g) county committee certification, and (h) intent to continue farming. 7 C.F.R. § 1945.62. Petitioners had satisfied these conditions.

disbursement: availability of funds and a first lien on the 1982 crops. The FmHA county supervisor received checks for the loan amount, indicating the funds were available. Petitioners were ready and able to satisfy the only other condition: that the FmHA obtain a first lien on their 1982 crops. Only the county supervisor's erroneous processing of the loans prevented Petitioners from receiving their funds.

Contrary to the Court of Appeals' suggestion, Petitioners' interest in their emergency loans was not "speculative." Rather, their interests were quite concrete: as the government now concedes, Petitioners had satisfied the objective criteria for emergency loans. They therefore had a strong and objectively reasonable expectation that they would receive the loan funds. Petitioners' reasonable expectation is entitled to Due Process Clause protection against deprivation without a timely hearing.

See, e.g., Griffeth v. Daniels, 603 F.2d 118, 121 (9th Cir. 1979) (applicant for aid's expectation that he would receive the aid for which he was eligible entitled to due process protection), cert. denied, 445 U.S. 970 (1980).

The mere fact that the Petitioners did not actually receive the aid to which they were entitled did not justify the Court of Appeals' divergence from the due process principles established by this Court. The Court has recognized that reliance interests, protectible as property under the Due Process Clause, can arise under statutory entitlement programs for monetary aid. Atkins v. Parker, 472 U.S. 115, 128 (1985) (food stamp benefits "are a matter of statutory entitlement for persons qualified to receive them" and are subject to due process protection). Moreover, with non-monetary entitlement programs, the Court has recognized that an applicant for, as opposed to a recipient of,

a government benefit has an interest in that benefit sufficient for constitutional protection. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 12 (1979) (applicant for parole).

The logic of Atkins and Greenholtz compels recognition of a protected property interest where an applicant for monetary aid has met all prerequisites for receiving that aid and the application has been approved. Even though the FmHA emergency loan programs require an application and review process, so do parole and food-stamp programs. That the FmHA has discretion to deny loans, as emphasized by the Court of Appeals, is irrelevant where, as here, all of the conditions established by the agency, at both the regulatory and individual loan levels, have been met.[5/]

[5/] Petitioners assume the FmHA could have refused to make the loans, even though Petitioners had met all the qualifications, if funds were not available. But here the funds

(continued...)

An entitlement arises when the established criteria are met, not when the government agency acknowledges that the criteria are met. Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2595 (1992). Persons thus should be able to rely on the criteria for eligibility established by the government without the need for further reliance on the government agency's accurate processing of an application for benefits. As this Court has held, "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

The Court of Appeals' approach, to the contrary, creates an unjustifiable safe haven

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5/ (...continued)
were available and the checks had actually been issued. The Government never argued that it could not make the loans.

for officials' arbitrary and capricious acts in denying aid to which an applicant is entitled. While not every applicant has more than a hope of receiving that aid, an applicant who meets all requirements does have much more. As one leading commentator observes:

> it would be inconsistent with any intelligible rationale underlying due process protection to deny all procedural safeguards to the new applicant where the law provides that all individuals meeting certain objective criteria are entitled to, say, welfare.

L. Tribe, American Constitutional Law, 690 (1988). The effect of the Court of Appeals' decision here is to compound the FmHA's erroneous denial of benefits by permitting agency officials to block administrative review. The agency has no legitimate claim to such protection from review of its own errors.

There is no satisfactory analytical or policy rationale for distinguishing the

failure to grant a benefit that has been earned from the removal of a benefit for which an applicant has qualified. To be sure, government agencies require considerable, legitimate discretion in conducting their business. But no agency needs the unreviewable discretion arbitrarily and capriciously to deny benefits for which an applicant has qualified. This Court should therefore reverse the Court of Appeals and hold that an applicant who had met all requirements for a federal benefit has an interest in that benefit adequate for protection under the Fifth Amendment Due Process Clause.

II.

The Sixth Circuit's Rejection Of Petitioners's Logan Claim For Failure To Plead "Gross Negligence" Misreads The Record And Constitutes Impermissible Appellate Factfinding.

Certiorari should also be granted because the Court of Appeals' rejection of Petitioners' Logan claim was based on a significant misunderstanding of the case's procedural posture and on impermissible factfinding at the appellate level.

Even if the Petitioners failed to meet the criteria for receiving their emergency loans, they had a constitutionally protectible right to have that issue adjudicated according to the agency's mandatory administrative hearing process. In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), this Court held that the right to have a claim processed under adjudicatory procedures created by statute was a species of property protected under the Due Process

Clause.[6/] The Court construed the concept of constitutionally protectible "property" broadly, as an individual entitlement grounded in state law that cannot be removed except "for cause." 455 U.S. at 430. Thus, under Logan, "property" need not be a tangible object or benefit: it can be an entitlement to receive a statutorily or regulatorily mandated hearing.

As in Logan, Petitioners had a right to redress their grievances guaranteed by an elaborate regulatory scheme -- a right of access that could only be removed for "cause." The FmHA regulations provide extensive protection for the loan applicant whose claim has been denied. See 7 C.F.R. § 1900 subpart B. For example, an applicant is entitled to appeal a loan-approval

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[6/] Because Logan involved a state-created right, the Court's analysis looked to the Fourteenth Amendment Due Process Clause. The Fifth Amendment Due Process Clause applies with equal force to federally created rights. See, e.g., Atkins v. Parker, 472 U.S. 115, 128 (1985).

officer's denial of assistance. 7 C.F.R. § 1900.56. The loan-approval officer is required to inform the applicant of this right. Id. In turn, a hearing officer is required to hear the appeal within 30 days of receiving a request for a hearing. Id. These are mandatory provisions. FmHA officials have no discretion whether to give notice of appeal rights or to hear an appeal. Petitioners had a due process entitlement to avail themselves of these procedures, but they were not given the required notice of their existence. Further, when Petitioners took the initiative and sought information from other FmHA officials on appeal rights, they were ignored.

Although Petitioners eventually received an appeal, it came too late. As noted above, the FmHA regulations contemplate that a rejected emergency loan applicant has the right to an appeal within 30 days, not nine months. The requirement of a timely

hearing recognizes the importance of prompt and efficient handling of emergency loans. By the time Petitioners' appeal was heard, they had been forced into bankruptcy with the inevitable loss of vital machinery and cropland. They no longer could produce sufficient crops to secure a loan in 1983.

Absent the improper handling of their loans and the subsequent delay in the hearing of their appeal, Petitioners would likely still be farming today. Dietrich and other FmHA officials deprived Petitioners of their property right to a timely hearing. The Court of Appeals erred in holding otherwise.

The Court of Appeals did not attempt to distinguish Logan. Instead, the Court held that even if Petitioners had a property interest in the FmHA's appeals process, they failed to allege Dietrich's "gross negligence" in denying them access. (App. 8a). That holding is erroneous for four reasons.

First, Dietrich's acts in blocking Petitioners' appeal were more than negligent -- they were intentional. Petitioners' allegations and evidence were that Dietrich consciously refused to respond to their inquiries and requests. He did not act by accident. He did not hope to help Petitioners and fail to do so by mistake. Negligence and gross negligence are thus not really the issue here. As in Logan, Petitioners' access to the adjudicatory process was deliberately blocked. That more than meets the test. See Collins v. City of Harker Heights, 112 S. Ct. 1061, 1069 n.10 (1992) (compiling cases where due process protections have been "applied to deliberate decisions of government officials to deprive a person of life, liberty or property").

Second, the Court of Appeals ignored the procedural posture in which this case was decided by the District Court. The alleged pleading defect was raised sua sponte by the

Court of Appeals. The Government's "Motion to Dismiss or In the Alternative For Summary Judgment" did not contend that the Petitioners had failed to allege or prove gross negligence. Thus Petitioners had no reason to build a record to refute what was not at issue. Yet the Court of Appeals improperly conducted its own fact-finding by purporting to examine the record and determining that no evidence of gross negligence existed. (App. 8a).

Given the stage of proceedings, the Court of Appeals' conduct was impermissible. The fact question of whether there was gross negligence or an intentional deprivation must be decided on remand after discovery on those subjects has been initiated and completed. Rule 12(b) of the Federal Rules of Civil Procedure provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not

> excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The Advisory Committee notes make plain that the non-moving party is entitled to a reasonable period of time to gather additional evidence with which to oppose the summary judgment motion. Fed. R. Civ. P. 12 Advisory Committee note. Here, no discovery directed to the gross negligence or intent issue was taken at all.

Third, Petitioners did allege that the FmHA officials' efforts to block their appeal constituted "outrageous conduct." That was perhaps inartful language, but it well conveys the concept of gross negligence or worse. Formalistic pleading has long been abolished in federal courts. Fed. R. Civ. P. 8; Conley v. Gibson, 355 U.S. 41, 47-8 (1957); Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991) (pleading requirements for

complaints alleging constitutional violations are no different than requirements for any other cause of action). Petitioners' failure to utter the magic words "gross negligence" should not decide the outcome of this case. See Fed. R. Civ. P. 9 (intent or knowledge and other condition of mind of a person may be averred generally).

Fourth, reasonable inferences from the present limited record do suggest gross negligence at the least. Dietrich clearly knew that Petitioners had a right to appeal his decision, but he failed to inform them of this right even in the face of Petitioners' inquiries.[7/] Petitioners thus have raised a material issue of fact as to whether Dietrich

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7/ In his affidavit, Dietrich stated that he gave Petitioners written notice of their appeal rights. Attached to his affidavit were the documents he allegedly sent to Petitioners. These make no mention of appeal rights. That supports Petitioner's affidavit statement that Dietrich did not inform them of their appeal rights. Neither the District Court nor the Court of Appeals could properly resolve this factual dispute on summary judgment or a motion to dismiss.

acted with gross negligence. See Nishiyama v. Dickson County, 814 F.2d 277, 282 (6th Cir. 1987) (en banc) (recognizing that "term 'gross negligence' evades easy definition" and that whether an act is grossly negligent involves fact issues of intent and reasonableness).

There was no basis for the Court of Appeals' sua sponte rejection of Petitioners' Due Process claim. This Court should remand for further proceedings enabling Petitioners to redress their deprivation.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Chester T. Kamin
Counsel of Record
C. Steven Tomashefsky
Edward J. Sebold

Jenner & Block
One IBM Plaza
Chicago, Il 60611
(312) 222-9350

APPENDIX

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

Joe B. Shaner and Cynthia K. Shaner,
Petitioners,
v.

The United States of America and
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Respondents.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit
APPENDIX

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1. OPINION AND JUDGMENT OF THE COURT OF APPEALS (1a)
2. ORDER DENYING REHEARING (8a)
3. MEMORANDUM DECISION OF DISTRICT COURT (11a)
4. LOAN APPROVAL LETTER (53a)
5. FmHA APPEALS PROCEDURES, 7 C.F.R. § 1900 SUBPART B (1982) (54a)

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-4173

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOE B. SHANER and
CYNTHIA K. SHANER,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed September 16, 1992

Before: KEITH and SUHRHEINRICH, Circuit Judges; and CONTIE, Senior Circuit Judge.

I

SUHRHEINRICH, Circuit Judge. In 1981, a natural disaster struck Ohio. As a result, the entire state was designated a disaster relief area. The Shaners, who grew corn and beans at their Fairfield County, Ohio, farm, were among the Ohio farmers who suffered crop production losses in excess of thirty percent and thereby qualified for emergency loan relief.

Prior to the disaster, the Shaners had incurred substantial indebtedness to Cambridge Production Credit Association ("PCA"). The crop losses prevented the Shaners from paying the 1981 installment on this debt. PCA demanded payment in full or a liquidation sale.

In January 1982, the Shaners applied to FmHA for an emergency loan. Within two weeks the application was denied for insufficient cash flow and inability to refinance existing loans. The Shaners persisted in their attempts to secure an FmHA loan. On May 6, they met with Douglas Dietrich, FmHA supervisor for Fairfield County.

Subsequent to the May 6 meeting, Dietrich issued a certificate of approval. The lone requirement listed on the certificate was "[s]ecurity for this loan is a [first] lien on 1982 crops." Dietrich also sent the Shaners a letter announcing the approval, "subject to the availability of loan funds." However, Dietrich was concerned about FmHA's position vis-a-vis PCA. In particular, he was concerned that PCA might encumber the Shaners equipment so as to prevent them from planting a 1982 crop and that, even if a 1982 crop were planted, PCA's claim to it would be senior to FmHA's.

Seeking to avoid these risks, Dietrich notified the Shaners in July 1982 of his intention to cancel the loans. The reasons he gave were the failure to obtain for FmHA a first lien on the 1982 crops and the failure to obtain a non-disturbance agreement from PCA.[1] The Shaners filed for bankruptcy in August 1982, and Dietrich canceled the loan approvals effective in September.

Upon cancellation, the Shaners appealed Dietrich's determination. Their appeal was denied on the grounds of

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[1]The non-disturbance agreement would have prevented PCA interfering with the Shaners' ability to plant a 1982 crop. The cancellation notice was the first occasion on which this requirement had been committed to writing. FmHA contends that Dietrich had orally informed the Shaners of this requirement; the Shaners deny this.

their failure to secure a non-disturbance agreement with PCA. On a subsequent appeal, FmHA's acting state director held for the Shaners, ruling that, because the Uniform Commercial Code would have given FmHA priority over PCA with respect to the 1982 crops, a first lien was unnecessary. On May 25, 1983, the acting state director reinstated the Shaners' application. Pursuing the application further, however, was not possible, as the Shaners were now in bankruptcy and the loss of land and equipment to their creditors disabled them from generating sufficient cash flow from their 1983 crops to qualify for a loan.

The parties now agree that Dietrich erred in requiring a first lien. The Shaners claim that this error constitutes negligence entitling them to recovery under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). They also claim that they were unconstitutionally deprived of various property rights. The District Court rejected these arguments and granted summary judgment against the Shaners. We now affirm.

II

The Shaners bring this claim under the Federal Tort Claims Act, which authorizes negligence suits against the federal government "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The Ohio Supreme Court has recently reviewed the line of cases dealing with the liability of lenders to borrowers in *Blon v. Bank One*, 35 Ohio St. 3d 98 (1988). Under the framework established by the *Blon* court, the borrower and lender stand at arm's length while negotiating the terms and conditions of the loan and no fiduciary duty exists at this stage of the relationship. Once, however, the negotiations are complete and the relationship moves into the loan processing stage, a fiduciary duty of disclosure is imposed on the lender. *Id.* at 102.

The Shaners believe that their relationship with the FmHA had blossomed into the loan processing stage.

They contend that FmHA's decision to cancel their loan resulted from negligence. Specifically, the concern on which the cancellation was based, the Shaners' failure to secure a first lien for FmHA, was obviated by U.C.C. § 9-312(2), which would have given FmHA the priority it sought through the lien.[2] The Shaners argue that FmHA was negligent in failing to recognize that requiring a first lien was unnecessary and in canceling the loan on this basis.[3] Since FmHA committed this negligence during the loan processing stage, the argument continues, FmHA violated its fiduciary duty to the Shaners.

The Shaners' reading of Ohio law is overripe. None of the cases it cites creates a broad fiduciary duty or a duty to avoid negligence. They merely create a duty to disclose. *Stone v. Davis*, 66 Ohio St. 2d 74, 78 (bank has fiduciary duty when "broaching the subject of mortgage insurance"), *cert. denied*, 454 U.S. 1081 (1981). The duty to disclose stands as an exception to the general rule that the borrower-lender relationship is not a fiduciary one. *See Umbaugh Pole Bldg. Co. v. Scott*, 58 Ohio St. 2d 282 (1979) (syllabus #1). We will not expand the fiduciary duty to disclose absent a clear expression of contrary intent by the Ohio courts, particularly in light of *Blon*, which sought to circumscribe the scope of this duty.[4]

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[2]The government concedes that the Shaners' reading of this provision, codified at Ohio Rev. Code Ann. § 1309.31(B), is correct and that the first lien requirement was unnecessary.

[3]The question of whether FmHA's insistence on a first lien was negligent is not before us. Although we assume for the purposes of this appeal that this was negligence, the ultimate determination would rest, of course, with the fact-finder.

[4]FmHA raises a second defense, the Shaners' failure to obtain a non-disturbance agreement from PCA. FmHA contends that the Shaners were notified of this requirement at their May 6, 1982 meeting with Dietrich. The Shaners claim that they were not so informed until the cancellation. If it was a condition for the loan, the Shaners' failure to obtain a non-disturbance agreement was adequate grounds for the cancellation. However, Mr. Shaner's affidavit raises sufficient doubt as to whether this was a condition to require a jury determination.

The Shaners argue alternatively that, if it has not already done so, the Ohio Supreme Court would impose a general fiduciary duty on FmHA, as its relationship with the Shaners is one of "special trust and confidence." *Blon*, 35 Ohio St. 3d at 102. This argument is predicated primarily on the public purpose with which FmHA is affected. In this respect, the Shaners liken their relationship with FmHA to that of an insured with its insurer. This analogy is fallow; for even if we accept it, it would only create a duty of good faith. Such a duty would require more than mere negligence as the basis for liability. Instead, the Shaners would be required to show that FmHA acted from a "dishonest purpose, moral obliquity, conscious wrongdoing," or in "breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." *Wasserman v. Buckeye Union Casualty Co.*, 32 Ohio St. 2d 69, 73 (1972). The record offers no hint of such motive or conduct.

The Shaners next contend that the Good Samaritan Doctrine imposes a duty of due care on FmHA. Although the Ohio Supreme Court has never explicitly adopted this doctrine, the Court has cited it favorably, and it appears to be the law of Ohio. *See Wissel v. Ohio High School Athletic Assn.*, Nos. C-900397, C-900566, 1992 Ohio App. LEXIS 904, at *19 (Mar. 4, 1992)(final publication pending). As the Shaners fail to satisfy the Good Samaritan Doctrine's requirements, however, we need not resolve this question.

Similarly, FmHA asserts that Dietrich told the Shaners, again at the May 6 meeting, that they would be required to make a delinquent payment to PCA. The Shaners contend that the only condition imposed was that they obtain a first lien for FmHA. Moreover, Dietrich's notice of cancellation does not list failure to make this payment in any way, let alone as a ground for canceling the loan approvals. Resolution of this argument also lies with the trier of fact. Therefore, neither of these arguments support FmHA's position that summary judgment was appropriate.

Recovery under the Good Samaritan Doctrine is limited to physical harm. Restatement (Second) of Torts § 323 (1964). The record contains no evidence of physical injury to the Shaners or their property. Therefore, summary judgment was properly granted as to the Good Samaritan claim.

III

The Shaners assert property rights in the FmHA emergency loan they applied for and in access to the FmHA's administrative appeal process and claim that they have been deprived of this property in violation of the Fifth Amendment. However, the Shaners do not seek to have these property rights restored.[5] Instead, they seek money damages as compensation for injuries resulting from the allegedly unconstitutional deprivation. The kernel of this contention is that the deprivation caused them to lose their farm. This claim, then, is in fact a *Bivens*[6] action. A *Bivens* action may be brought only against individual federal officials, not against the United States. *See, e.g., Ashbrook v. Block*, 917 F.2d 918, 924 (6th Cir. 1990). Therefore, this claim may only be asserted against Dietrich individually.

Like the District Court, we do not believe that either of the asserted interests constitutes a property right. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

The Shaners cite *Association of Orange County Deputy Sheriffs v. Gates*, 716 F.2d 733 (9th Cir. 1983), *cert.*

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[5]Indeed, the FmHA actually restored the asserted property rights, allowing the Shaners to pursue their administrative appeals and reinstating their loan application.

[6]*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

denied, 466 U.S. 937 (1984), for the proposition that they have a property interest in the FmHA emergency loan. This case actually supports the opposite conclusion. There, a California statute allowed retired deputy sheriffs to carry concealed weapons if the agency from which they retired issued them a certificate. In addition, this privilege could be denied or revoked for good cause. Several retired deputies claimed that this statute created an entitlement of which they could not be deprived without due process. This argument was rejected on the grounds that the good cause provision left no significant restriction on the agency's discretion; therefore, no entitlement was created. *Id.* at 734.

The FmHA has similarly broad discretion in determining whether to approve an application. For instance, the determination of whether an applicant has presented a viable farm plan or has offered sufficient security are left largely to the sound judgment of FmHA. *See* 7 U.S.C. §§ 1961(a), 1964(d). Therefore, the Shaners' interest in obtaining an emergency loan was too speculative to be considered a property right. *Accord Nelson v. United States*, 16 Cl. Ct. 510 (1989) (property right does not exist until loan is approved and a contractual right results); *cf. Ashbrook*, 917 F.2d at 924 (no property right in additional FmHA funding).

When the Shaners' emergency loan application was first denied in January 1982, FmHA provided them with a complete statement of their appeal rights as required under 7 C.F.R. § 1900.56. After the July 1982 rejection, the notice to the Shaners was incomplete, omitting the statements required under section 1900.56(a)(4). The Shaners claim, misguidedly, that they had a property right in this information and that it was deprived without due process.

It is well-established that "due process 'is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property.'" *Nishiyama v. Dickson County*, 814 F.2d 277, 281-82 (6th

Cir. 1987)(en banc)(quoting *Daniels v. Williams*, 474 U.S. 327, 328 (1986))(emphasis in original). Even if the Shaners had a property right in information regarding administrative appeals, they must show that Dietrich was grossly negligent in failing to provide the information. *See id.* at 282.[7] *But see, e.g., Collins v. City of Harker Heights*, 117 L. Ed. 2d 261, 274 n.10 (intimating that an even more exacting requirement, deliberate or intentional conduct, should be applied). The Shaners have failed to even allege gross negligence. Nor does the record contain any evidence that would support such an allegation. Hence, any right the Shaners did have in the administrative appeal information was not deprived in violation of the due process clause.

IV

For the foregoing reasons, the district court's opinion and order granting summary judgment is AFFIRMED.

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[7] Although *Daniels* and *Nishiyama* involved Fourteenth Amendment due process claims against state officials under 42 U.S.C. § 1983, there is no reason to regard the Fifth Amendment due process clause as having a different meaning for the purposes of a suit against a federal official. *See* Erwin Chemerinsky, Federal Jurisdiction § 9.1, at 452-53 (1989). Thus, the *Nishiyama* gross negligence requirement applies here.

No. 91-4173

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOE B. SHANER; CYNTHIA K. SHANER, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, THE FARMERS HOME ADMINISTRATION; DOUGLAS G. DIETRICH; WAYNE C. MATTINGLY, Defendants-Appellees.	)	**ORDER**

BEFORE: KEITH and SUHRHEINRICH, Circuit Judges; and CONTIE, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the

suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

November 4, 1992
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOE B. SHANER, et al.,

Plaintiffs,

-V- **Case No. C2-86-449**

THE UNITED STATES OF AMERICA, et al.,

Defendants.

OPINION AND ORDER

This matter comes before the Court pursuant to Plaintiffs' Second Motion for Summary Judgment filed on April 3, 1989 and Defendants' Motion to Dismiss, or in the alternative, for Summary Judgment filed April 5, 1989. Both motions were filed with memorandum in support of the motions. In addition, on April 20 and 21, 1991, respectively, the plaintiffs filed a Memorandum Contra to the Motion of Defendants and a Supplemental Memorandum Contra. In

response, Defendants filed a Reply Memorandum on May 16, 1989.

These motions arise from an action initiated by Plaintiffs on April 22, 1986, seeking to recover damages for plaintiffs' losses and injuries allegedly caused by the negligence of the defendants in performing allegedly statutory, regulatory and constitutional duties in relation to plaintiffs' application to the Farmers Home Administration for emergency loans under the provisions of 7 U.S.C. 1961 et seq. Jurisdiction is claimed, and appropriate, under 28 U.S.C. §§ 1331, 1336, 1346(b) and 2671-80. Venue is likewise proper in this Court.

FACTS

This action arises from the plaintiffs' application to the Farmers Home Administration (hereinafter "FmHA") for

emergency loans pursuant to the provisions of 7 U.S.C. § 1961 et seq. in early January, 1982. Plaintiffs are farmers who have been recipients of certain farm loans from the FmHA in the past. Defendants named in the complaint are the United States, the FmHA and Douglas G. Dietrich in both his individual and official capacity as the FMHA County Supervisor and Loan Approval Officer[1/]. The plaintiffs claim that they suffered damages due to the defendants' negligence in failing to determine the correctness of plaintiffs' position in regard to FmHA's lien priority, failing to perform duties imposed on them by FMHA regulations and that such actions by the defendants breached the plaintiffs' Fifth Amendment rights.

1/ Wayne C. Mattingly was also named individually as a defendant in the original complaint but was dismissed as a party defendant by this Court's order of August 31, 1988.

Plaintiffs are the recipients of certain farm loans through the FmHA, an agency within the Department of Agriculture, pursuant to the Consolidated Farm and Rural Development Act, 7 U.S.C. 1921-1992. In 1981, plaintiffs lost over 30% of their normal crop production due to a natural disaster, thus qualifying them for consideration for an emergency loan from the FmHA pursuant to 7 U.S.C. 1961 et seq. In January of 1982, the plaintiffs applied for an emergency loan from the FmHA. On May 4, 1982, the plaintiffs' loan was approved by the FmHA County Committee subject to the security requirement set down by defendant Douglas G. Dietrich. On May 13, 1982, plaintiffs were notified by Dietrich of the approval of their loan application subject to the requirement that FmHA would obtain the first lien on plaintiffs' 1982 crops.

Having not received the necessary assurances of first lien on the plaintiffs' 1982 crops, on July 7, 1982, defendant Dietrich canceled the plaintiffs' loan, and shortly thereafter informed the plaintiffs that the loan had been canceled because the security requirement that FmHA receive the first lien on plaintiffs' 1982 crop had not been met. Dietrich claimed that the necessary secured interest could not be put in place due to another creditor obtaining a judgment lien against the plaintiffs. Therefore, FmHA took the position that they would not have first and best rights to the crops and as such they would not extend the funds. Dietrich also mentioned that the plaintiffs' failure to obtain a non-disturbance agreement from the same creditor prohibited the loan from going through.

Plaintiffs further claim that, contrary to FmHA regulations, they were not

informed of their rights of appeal despite their requests for such information.

It is undisputed, in retrospect, that FmHA would have had the first lien on plaintiffs' 1982 crops despite the judgment lien against the plaintiffs by another creditor. Under Ohio Revised Code 1309.31, FmHA's lien would have had priority over the judgment lien. New value security interests in crops based on a current production loan have priority over an earlier security interest in the crop which secured obligations due more that six months before the crops became growing crops under 1309.31.

As previously stated, Dietrich advised plaintiffs that the reasons for the cancellation were the judgment lien and the failure to gain a non-disturbance agreement. Plaintiffs met with Dietrich on August 3, 1982, however, their request for reconsideration was denied. On April 26,

1983, plaintiffs were granted an appeal hearing before Wayne C. Mattingly a FmHA hearing officer. On May 5, 1983, Mattingly upheld Dietrich's decision to cancel the loans. Plaintiffs appealed the decision and on May 25, 1983, the decision was overturned by Glenn J. Hertzler, Jr., the acting state director of the FmHA. Hertzler determined that the initial decision was incorrect and allowed the plaintiffs' application to be reinstated.

Plaintiffs allege that during the ten months after their loan was canceled and before the initial determination was overruled, they lost crop land and equipment, were forced into bankruptcy and suffered severe emotional distress. Plaintiff's complaint alleges that these damages were the proximate result of the defendants' negligence in breaching its statutory, regulatory and constitutional duties. The

complaint alleges three claims against the defendants. Plaintiffs claim that these injuries were caused by the negligence of the defendants in failing to determine the correctness of their position in regard to the lien priority, failing to perform duties imposed upon them by FmHA regulations and that defendants negligence deprived plaintiffs of their Fifth Amendment rights.

In plaintiffs' Motion for Summary Judgment, the plaintiff's claim that the United States, if a private person, would be liable under Ohio law. This would entitle the plaintiffs to recovery under the Federal Tort Claims Act pursuant to 28 U.S.C. § 1346, the exclusive enabling statute for a tort claim against the United States. Plaintiffs also claim that there existed a fiduciary relationship between them and the defendants which required the defendants to use due care. Finally, plaintiffs claim that the

"Good Samaritan Doctrine" imposes a duty upon the defendants not to be negligent in performing services undertaken gratuitously or for consideration. Restatement (Second) of Torts § 323 (1977).

In the defendants' Motion to Dismiss, or in the alternative, for Summary Judgment, the defendants claim that the tort claim against defendant Dietrich in his official capacity should be dismissed pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELR & TC Act), 28 U.S.C. § 2679. Defendants further claim that the action against Dietrich in his individual capacity should be dismissed due to qualified immunity. The claim against the FmHA claims that the defendants should be dismissed as the FmHA is not a suable entity. The defendants allege that the plaintiffs have no FTCA claim as there is no state law basis for imposing liability on the defendants.

Finally, the defendants claim that the Fifth amendment claim should be dismissed as the plaintiffs failed to set forth the particular violation of the amendment and that such a claim is time barred by the appropriate statute of limitations. The court will first look to the standard to be applied to the respective motions before the Court.

STANDARD OF REVIEW

A district court may not dismiss a claim under Rule 12(b)(6) for failure to state a claim unless it is apparent beyond a doubt to the court that the plaintiff can prove no set of facts to support a claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In determining whether the facts presented in a complaint support a claim upon which relief may be granted, the district court is to liberally construe the facts in the light

most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357, at 594 (1969). The essence of a court's inquiry is to determine whether the allegations contained in the complaint satisfy the mandate of the Federal Rules that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

In considering this motion, the Court is mindful that the standard for summary judgment "mirrors the standard for a directed verdict under [Rule 50(a)], which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (citing Brady v. Southern Ry.

Co., 320 U.S. 476, 479-80 (1943)). Thus, the Supreme Court concluded in Anderson that a judge considering a motion for summary judgment must "ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair minded jury could return a verdict for the plaintiff on the evidence presented." 477 U.S. at 252.

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In essence, the inquiry is whether the evidence presented a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Anderson, 477 U.S. at 251-52.

Such an inquiry necessarily implicates the evidentiary standard of proof that would apply at the trial on the merits. As a result, the Court must view the evidence presented through the prism of the substantive evidentiary burden. Rule 56(e) therefore "requires the non-moving party to go beyond the pleadings and by their own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file', designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial". Id. at 322.

In Banks v. Rockwell International N. Am. Aircraft Operations, 666 F. Supp. 1053 (S.D. Ohio 1987) (Graham, J.), this district enunciated the importance of granting summary judgments in appropriate situations by stating as follows: "Although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Id. at 1056 (citing Celotex Corp. v. Catrett, 477 U.S. at 327, (quoting Fed. R. Civ. P. 1); Anderson, 477 U.S. at 252.

Thus, the mere existence of a scintilla of evidence in support of a plaintiff's claim is insufficient--there must be evidence upon which a jury could reasonably find for the plaintiff. Anderson, 477 U.S. at 252. Having discussed the Rule 56 standard of review, the Court now turns to the merits.

LAW AND ANALYSIS

I. MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

A. MOTION AS IT RELATES TO DEFENDANT DIETRICH.

The Court will first examine the issue of whether there can be any recovery against the Defendant Douglas G. Dietrich, in his individual capacity, for the tortious conduct alleged. In so doing the Court must first look to the Federal Employees Liability Reform and Tort Compensation Act ("FELR & TC"). 28 U.S.C. § 2671 et seq.

In 1988, Congress amended the Federal Employees Liability Reform and Tort Compensation Act. The amendment was expressly made retroactive and, therefore, is applicable to this case.[2/] The amendment

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[2/] The Historical and Statutory Notes to the 1988 Amendment, 28 U.S.C. § 2679 (Supp. 1990), notes the effective date of the amendment as follows:

(continued...)

provides that a common law tort claim against an individual employee of the United States, acting within the scope of his/her authority, is precluded and the exclusive remedy for the alleged negligence or wrongful conduct of the employee is against the United States under the FTCA. 28 U.S.C. § 2679(b)(1). When the Attorney General certifies that the employee was acting within the scope of their authority, the United States is substituted

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2/ (...continued)

Effective Date of 1988 Amendment. Section 8 of Pub.L. 100-694 provided that:

> **(a) General Rule.**--This Act and the amendments make by this Act [enacting section 831c-2 of Title 16, Conservation; amending sections 2671, 2674, and 2679(b), (d) of this title; and enacting provisions set out as notes under sections 1 and 2671 of this title] shall take effect on the date of the enactment of this Act [Nov. 18, 1988].
>
> **"(b) Applicability to Proceedings.**--The amendments made by this Act shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act [Nov. 18, 1988].

as the party defendant. 28 U.S.C. § 2679(d)(1).

In the case at bar, it is clear that except for the plaintiffs' Fifth Amendment claim, the complaint sounds in tort. In addition, the defendants have provided the required certification by the Attorney General that the individual defendant was acting within the scope of his office. See Defendants' exhibit B. Further, it is apparent to this Court that the Attorney General's determination is correct. There is nothing in the record to indicate, nor do plaintiffs allege, that Dietrich was acting outside the scope of his authority. Mistakes in judgment, either in fact or in law, do not constitute, in of themselves, actions beyond the scope of authority. In light of the preceding, the tort claims against the defendant Dietrich in his individual capacity is hereby **GRANTED** and as such all tort claims

against the defendant in his individual capacity are hereby **DISMISSED** pursuant to Federal Rules of Civil Procedure 12 (b)(1) and 12 (b)(6), for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The plaintiffs' exclusive remedy for the alleged negligence of Dietrich lies in the FTCA claim against the United States[3/]. The plaintiffs' Fifth Amendment claim against defendant Dietrich, however, survives the motion to dismiss due to the exception for alleged violations of the Constitution. 28 U.S.C. § 2679 (b)(2)(A). As such, the

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3/ see generally: Smith v. United States, 877 F.2d 40,42 (11th Cir. 1989), Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989), Sowell v. American Cyanamid Co., 888 F.2d 802, 805 (11th Cir. 1989), Springer v. Bryant, 897 F.2d 1085, 1086 (11th Cir. 1990), Arbour v. Jenkins, 903 F.2d 416, 421 (6th Cir. 1990), Nasuti v. Scannell, 906 F.2d 802, 804 (1st Cir. 1990), Melo v. Hafer, 912 F.2d 628, 639 (3rd Cir. 1990), Christensen Ward, 916 F.2d 1462, 1472 (10th Cir. 1990).

Defendant's Motion to Dismiss as to the Fifth Amendment claim is hereby **DENIED.**

Next the Court turns its attention to the claim of liability of Defendant Dietrich in his official capacity as FmHA County Supervisor. The court is of the opinion that Dietrich cannot be sued in his official capacity. It is well settled that a suit against an employee of the United States in their official capacity, acting within the scope of their authority is in actuality, a suit against the United States subject to the defense of sovereign immunity. Larson v. Domestic and Forelan Commerce Corp., 337 U.S. 682 (1949), Portsmouth Redevelopment Authority v. Pierce, 706 F.2d 471, 473 (4th Cir. 1983). As previously mentioned, it is clear that the defendant Dietrich was acting within the scope of his authority. Furthermore, there has been no waiver of immunity by the United States that allows

recovery against Dietrich when acting in his official capacity. Therefore, defendant Dietrich is immune from liability for the portion of plaintiffs' complaint sounding in tort. As such, the motion to dismiss as to all claims against Defendant Dietrich in his official capacity are hereby **GRANTED** and all claims against Dietrich in his official capacity are likewise, hereby **DISMISSED** for a lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Once again, the plaintiffs' exclusive remedy lies against the United States under the provisions of the FTCA (28 U.S.C. § 1346(b)).

B. MOTION AS IT RELATES TO DEFENDANT FmHA.

Next the Court looks to the claims levied against the FmHA. Recovery against the FmHA is likewise precluded. It is well settled that an agency of the United States cannot be sued eo nomine without a clear waiver of immunity by Congress. See, e.g.,

United States v. Testan, 424 U.S. 392, 399 (1975) ; United States v. King, 395 U.S. 1, 4 (1969); Soriano v. United States, 352 U.S. 270, 276 (1957); and United States v. Sherwood, 312 U.S. 584, 586 (1941). Plaintiffs, have not demonstrated the existence of such a waiver and the Court finds none. There is no explicit statutory waiver nor can there be implied such a waiver since the FmHA, as an entity of the Department of Agriculture, does not have the authority to sue or be sued. 7 U.S.C. § 2201 et seq. Furthermore, other courts have found that "the FmHA is not a legal entity capable of being sued for money damages". Gray v. Rankin, 721 F. Supp. 115, 117 n.3 (S.D. Miss. 1989).

Clearly, FmHA is immune from suit under the doctrine of sovereign immunity. For this reason, Defendant FmHA's motion to dismiss is hereby **GRANTED**. And as such, the

tort claims against the FmHA are hereby **DISMISSED** for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).

C. MOTION AS IT RELATES TO DEFENDANT UNITED STATES.

As previously stated, the exclusive remedy for the plaintiffs' tort claims arising out of their application for the emergency loan is against the United States under the provisions of the FTCA. There are two exceptions to the FTCA which would act as a bar to suits against the United States under the FTCA which must be examined in the case sub judice.

The first is the misrepresentation exception of 28 U.S. C. § 2680(h). The second applicable exception is the discretionary function exception of 28 U.S.C. § 2680(a). For the reasons set forth below, the Court finds that the applicable exceptions do not bar plaintiffs from recovery in the instant case and as such this

cannot be a basis upon which a dismissal could be granted.

The exception of 28 U.S.C. § 2680(h) provides that the FTCA does not apply to cases of misrepresentation. This case does not come within the scope of the exception. This is not a case of alleged misrepresentation by a federal employee. Rather, the case is one based on the alleged failure to determine the correctness of plaintiffs' position in reference to the lien issue and the failure to comply with the controlling regulations. Plaintiffs do not suggest that the defendants misrepresented any fact to them, but instead allege that the defendants were negligent in performing their duties. Therefore, the exception contained in 28 U.S.C. § 2680(h) does not bar plaintiffs' recovery.

The second potential exception is the discretionary function exception contained in

28 U.S.C. § 2680(a) . The exception encompasses discretionary decisions by federal employees acting within the scope of their authority. The application of the discretionary function exception has proven to be extremely difficult and has provoked much discussion by the courts. A function is generally considered discretionary if it involves a policy determination, decision or judgment or is at the planning level. Dalehite v. United States, 346 U.S. 15 (1953). The exception does not extend to the operational level. Dalehite, 346 U.S. at 18. The exception is meant to insulate federal employees' decisions based upon public policy considerations. Berkowitz v. United States, 486 U.S. 531 (1988). Where the decision is prescribed by specific statutory or regulatory guidelines it is not discretionary. Berkowitz 486 U.S. at 546-47. Generally, the administration of loan programs is considered

to be within the discretionary function exception. See Tueoker v. Farmers Home Administration, 708 F.2d 1329, 1332 (8th Cir. 1983).

However, in the instant matter the actions complained of by the plaintiffs do not come within the discretionary function exception. The actions complained of by the plaintiffs involve the cancellation of a loan initially approved by the defendants and the failure of the defendants to follow specific regulatory guidelines. In this case, the loan was actually approved subject to a specific requirement. The loan was canceled when it was erroneously determined that the security requirement had not been meet. It is clear that the complaint is concerned with the cancellation of the loan and the subsequent events. The cancellation of the loan was required under FmHA regulations. as the security requirement was apparently believed

to have not been meet. Although this decision was erroneous, the defendants had no discretion at the cancellation stage as they were operating under clear regulations and guidelines. The defendants were acting at the operational level of governmental activity and not the planning level. The complaint is concerned with the defendants' actions concerning the processing of the plaintiffs' loan. This does not involve a policy judgement or determination by the defendants and does not constitute the administration of a loan program. Furthermore, the defendants' decision was prescribed by specific regulatory guidelines. Since the complained actions by the defendants involve operational rather than planning activities the discretionary function exception does not bar recovery.

The FTCA provides for recovery of tort claims against the United States if it would

be liable as a private person under state law. For the plaintiffs, to be able to recover, they must demonstrate some duty arising under the law of Ohio that was breached by the defendants and was the proximate cause of their injuries. The plaintiffs' cite three grounds for the existence of a duty owed them by defendants under state law. The plaintiffs' claim that such a duty can be found in the Ohio law of negligence.

The plaintiffs, first cite Stone v. Davis, 66 Ohio St. 2d 74 (1981) for the proposition that the defendants owed a duty to the plaintiffs under Ohio law due to the lender-borrower relationship. Plaintiffs, claim that Stone imposes a duty on the defendants as the lender in the loan processing phase of the lender-borrower relationship.

In Stone the borrower, in executing the mortgage documents, signed a statement that provided, "I desire mortgage insurance", however, the bank failed to inform the individual that signing the document and noting the desire for mortgage insurance had no practical effect and it was incumbent upon the borrower to seek out and obtain the insurance.[4/] The Ohio Supreme Court held that a lender under these circumstances owed a further duty Of disclosure to a borrower at the loan processing phase. Id. at 78. The Court held a lending institution liable for damages for failing to inform the borrowers of the advantages of procuring mortgage insurance. Id. at 79. The Court did note, however, that "while a bank and its customer may be said to stand at arm's length in

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4/ The facts surrounding the case begged the question, "What purpose did the declaration serve unless it was an offer to provide insurance giving the borrower the opportunity to accept or deny?"

negotiating the terms and conditions of a mortgage loan, it is unrealistic to believe that this equality of position carries over into the area of loan processing, which customarily includes advising the customer as to the benefits of procuring mortgage insurance on the property which secures the bank's loan." Id. at 78-79.

In the instant case the plaintiffs claim that the defendants owed them a further duty as they were in the loan processing phase of the lender-borrower relationship.

The plaintiffs' claim that Stone imposes a duty upon defendants is flawed in several respects. Even assuming that the further duty to disclose information concerning the procurement of mortgage insurance could be expanded to meet the facts of this case, it is not entirely clear that ohio law imposes a per se duty on the lender. The basic principle under Ohio law is that

"the relationship of debtor and creditor without more is not a fiduciary relationship". Unbough Pole Building Co. v. Scott, 58 Ohio St. 2d 282, 286 (1979). Furthermore, Ohio only recognizes the creation of a fiduciary relationship, "when both parties understand that a special trust or confidence has been reposed". Umbaugh, 58 Ohio St. at 286.[5] When the parties are negotiating the terms and conditions of the loan there is no further duty imposed upon the lender without an understanding between the parties of a special trust or confidence being reposed.

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[5] Stone further provides that a "fiduciary relationship" is one "in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." Id. at 78 (quoting In re Termination of Employment, 40 Ohio St. 2d 107, 115 (1974).

Blon v. Bank One, 35 Ohio St. 3d 98, 102 (1988).

In Blon, the Supreme Court of the State of Ohio held that, "a creditor and consumer stand at arm's-length in negotiating the terms and conditions of a consumer loan and, absent an understanding by both parties that a special trust and confidence has been reposed in the creditor, the creditor has no duty to disclose to the consumer the existence and details of a finder's fee or similar arrangement with a credit arranger." Id. at 102. As such the Court distinguished the earlier Stone decision as dealing with "loan processing" rather than "loan negotiation".

While this Court is of the opinion that neither Stone nor Blon mimic the facts and circumstances in the case before this Court, the case at bar does not encompass the imposition of a further duty upon the

defendants on the basis of Stone. The cancellation of the loan comes closer to the "loan negotiation" phase of Blon than the "loan processing" phase of Stone. While this may appeal counter-intuitive, the defendants and plaintiffs were concerned with the terms and conditions of the loan. While the loan was approved, its approval was subject to the security requirement set forth by the defendants. In Stone the loan had been approved and closed, the terms and conditions were set. In the case at bar, the loan was never finally approved or closed as the terms and conditions set forth by the defendants were apparently not met. The loan processing duty imposed on the lender based upon Stone does not create liability for the defendants in this case.

There has been no creation of a fiduciary relationship between the parties that would warrant a duty being imposed on

the defendants in the loan negotiation phase. A further duty can be imposed upon the lender if there is a special relationship or understanding between the parties. Umbaugh, 58 Ohio St. at 286. Blon, 35 Ohio St. 3d at 102. It should first be noted that there is no state nor federal statute, nor any common law that explicitly creates a fiduciary relationship under the circumstances of the case. Furthermore, nothing in the facts demonstrate the explicit creation of such a relationship between the parties. Therefore, the Court must look to see if there was an understanding between the parties of a special fiduciary relationship.

Plaintiffs assert that the FmHA statutory scheme is unique and that it creates A fiduciary relationship between the parties. Plaintiffs allege that the statutory provisions for management assistance and agency supervision create a

relationship of trust and reliance between the parties. Plaintiffs further allege that the statutory scheme is designed for the benefit of the borrower. Plaintiffs claim that the borrower's reliance on the scheme and the position of defendants in the relationship constitute a fiduciary relationship. Finally, plaintiffs claim that the extensive regulatory scheme and the reliance of those regulated mandate the imposition of such a relationship. These arguments not only relate to the understanding between the parties at the loan negotiation phase but also to the plaintiffs second grounds for the imposition of a duty on the defendants, the existence of a fiduciary relationship.

There is no basis for inferring a fiduciary relationship between the parties. The relationship between the parties was that of lender and borrower and nothing more.

While the intent of the statutory scheme is undoubtedly to aid farmers, this, in and of itself, does not create a fiduciary relationship. The mechanism for aiding farmers is the creation of a loan program administered by the FmHA. The intent of the scheme is irrelevant as the result is the creation of a debtor-creditor relationship and nothing more. The loan program may be more favorable to farmers than loans available in private markets, however, the FmHA is just another creditor. The FmHA attempts to protect its interests and acts and has the same status, for the most part, as any other creditor.

The mere relationship between the parties is also insufficient to impose a duty on the defendants. While it is true that the FmHA can provide management assistance and supervision and can become involved in the farmers ~~operati~~ons, this hardly constitutes a

fiduciary relationship. The mere giving of advice does not create a special relationship between the lender and the borrower. Umbaugh, 58 Ohio St. 2d at 287. In terms of the administration of the loan program, the agency and the farmer-borrower stand at arms length, both seeking to protect their interests. While it may be true that the FmHA is in a superior position, this is true of virtually all lender-borrower situations by their very nature.

The reliance of the farmers regulated by the FmHA and the "mesh of regulations" also fail to create a fiduciary relationship. Farmers" reliance upon FmHA loans is not due to any fiduciary relationship but instead is due to the fact that the FmHA may be a last possibility to obtain needed funding. The intent to aid farmers has been expressed by establishing a loan program to aid farmers in obtaining needed funding. This is hardly

analogous to the supervision of Indian lands by the Federal Government in United States v. Mitchell, 463 U.S. 206 (1983), as contended.

There is no basis for crafting a fiduciary relationship between the parties that would impose a duty upon the defendants. Plaintiffs cannot overcome the fact that the relationship between the parties was that of debtor and creditor. There is no basis for the parties or this Court to infer that a fiduciary relationship was created due to the statutory scheme or the interaction of the parties. There is no state law that would justify the imposition of such a relationship upon the parties. There are insufficient grounds for inferring a fiduciary relationship existed between the parties. Therefore, no fiduciary relationship can be found or imposed upon the defendants.

There are no other sources of Ohio law that would impose a duty upon the defendants

in this case. State law would not impose a duty to inspect or seek legal counsel or to assure the correctness of administrative decisions. There is simply no duty under the laws of the State of Ohio that would allow the plaintiffs to recover under their tort claims.

Plaintiffs' third ground for finding a duty under state law that would provide a basis for liability under the FTCA is based upon the Good Samaritan Doctrine. The parties agree that the doctrine is applicable in the law of Ohio. Plaintiffs allege that the defendants undertook to perform services upon which the plaintiffs relied and the defendants performed the services negligently causing the plaintiffs damages.

The "Good Samaritan" doctrine does not apply to the facts of the case at bar and certainly does not create a duty owed to the plaintiffs. First, the FmHA in performing

its lender function cannot be considered to have undertaken to perform a service for its borrowers. The lender and borrower relationship entails arms length transactions in which each party seeks to protect its interests. The agency has not taken upon itself to perform any services for the borrower. second, plaintiffs have failed to satisfy the rest of the doctrine. Plaintiffs have failed to demonstrate that the "services" provided by the defendants were necessary for the protection of their person or things, or that the failure to use care increased the risk of harm. Finally, plaintiffs have simply failed to demonstrated a single instance where Ohio law would impose a duty on a lending institution under the facts of this case. The Good Samaritan doctrine is insufficient to impose a duty upon the defendants in this case.

Therefore, for the above-stated reasons, and upon review of the facts and law in this case it is the opinion of this Court that the motion for dismissal as to the claims of negligence should be and is hereby **GRANTED.** Thus, the plaintiffs' FTCA claims are hereby **DISMISSED.**

The plaintiffs also assert a violation of their Fifth Amendment rights by the alleged misconduct of the defendants. Plaintiffs claim that the failure of defendants to perform their statutory and regulatory duties constituted a deprivation of their due process rights.

However, in order to maintain a Fifth amendment claim the plaintiffs must first establish that they possess a constitutionally protected property interest in the benefits offered by the various FmHA loan programs. DeJournett v. Block, 799 F. 2d 430 (8th Cir. 1986); McCachren v. United

States Department of Agriculture, 599 F.2d 655 (5th Cir. 1979).

While the various statutory and regulatory provisions relied upon by the plaintiffs entitle them to apply for FmHA loans and establish a regulatory procedure for processing and reviewing loan applications, these provisions do not transform the plaintiffs' unilateral hope, desire, or need for a FmHA loan into a legitimate claim of entitlement to the loan itself. See Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct 2701, 2709, 33 L.Ed.2d 548 (1972). Thus these provisions create no property interest on which the plaintiffs' constitutional claim may properly be based.

Because the plaintiffs have failed to plead the existence of a constitutionally protected property interest, it is the opinion of this Court that the motion for dismissal as to the claim of Fifth amendment

violations should be and is hereby **GRANTED.** Thus, the plaintiffs' Fifth amendment claim is hereby **DISMISSED.**

Based upon the above-stated rulings, this matter is hereby **DISMISSED** in it entirety.

IT IS SO ORDERED.

GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMERS HOME ADMINISTRATION

Ex. C

1113 East Main Street
Lancaster, OH 43130

Mr. and Mrs. Joe B. Shaner
12029 Lake Rd. NE
Millersport, OH 43046

May 12, 1982

EM Operating Loan $68,330
EM Actual Loss Loan 83,170

Dear Mr. and Mrs. Shaner:

Loans have been approved in the above amounts, subject to the availability of loan funds. Please see your copy of the enclosed Farm and Home Plan for the use of these funds.

If you have any questions please contact this office.

Sincerely,

Douglas G. Dietrich

DOUGLAS G. DIETRICH
County Supervisor

Farmers Home Administration is an Equal Opportunity Lender.
Complaints of discrimination based on race, sex, religion, age, national origin, marital status or handicap should be sent to:
Secretary of Agriculture, Washington, D.C. 20250

quire personal property pledged, mortgaged, conveyed, attached, or levied upon to collect indebtedness, and accept title to any property so purchased or acquired.

(o) Take possession of, maintain, and operate security or acquired real or personal property or interests therein, sell or otherwise dispose of such personal property, and execute and deliver contracts, caretaker's agreements, leases, and other instruments in connection therewith, as appropriate.

(p) Execute proofs of loss on insurance contracts and endorse without recourse loss payment drafts and checks.

(q) Issue, publish and serve notices and other instruments.

(r) File or record instruments, whether separate instruments, or by making marginal entries, or by use of other methods permissible under State law.

§ 1900.3 State office staff and county office employees.

The following officials and employees of the Farmers Home Administration, in accordance with applicable laws, and the regulations implementing these laws, for and on behalf of, and in the name of the United States of America or the Farmers Home Administration, are also severally authorized within the area of their respective jurisdictions to perform the acts specified in paragraphs (k) to (r), both inclusive, of § 1900.2: Chief, Farmer Programs/Specialist; Chief, Rural Housing/Specialist; Chief, Community Programs/Specialist; Chief, Business and Industry/Specialist; Property Management Specialist; and State Supervisor; each District Director, County (including Parish) Supervisor, Assistant County Supervisor, Emergency Loan Supervisor, Assistant Emergency Loan Supervisor, or other supervisor or assistant supervisor; and in the absence or disability of any such official or employee, the person acting in the position.

§ 1900.4 Ratification.

All written instruments affecting title to real or personal property, including but not limited to deeds, releases, satisfactions, subordination agreements, severance agreements, consents, waivers, assignments, declarations of trust, and heretofore executed by officials or employees of the agencies or other entities referred to in § 1900.1 to carry out any purpose authorized by law, incident to the administration of programs under the jurisdiction of said agencies or other entities, are hereby approved, confirmed, and ratified.

§ 1900.5 Effect on other regulations.

This subpart does not revoke or modify any other delegation or redelegation; instruction, procedure, or regulation issued by, or under authority of, the Administrator of the Farmers Home Administration.

Subpart B—Farmers Home Administration Appeal Procedure

Source: 46 FR 3818, Jan. 16, 1981, unless otherwise noted.

§ 1900.51 Purpose.

This subpart provides a uniform procedure whereby a person or organization may appeal any Farmers Home Administration (FmHA) program administrative action directly affecting such person or organization. This procedure does not apply to Guaranteed loans, debt settlement actions as found in Part 1864 of this chapter (FmHA Instruction 456.1), Freedom of Information Act or Privacy Act appeals, and is not intended to affect the Suspension and Debarment procedure found at Subpart E of Part 1924 of this chapter. This procedure takes precedence over all other FmHA appeals procedures affecting applicants, borrowers, or grantees. Tenant appeals are covered in Subpart L of Part 1944 of this chapter. This regulation does not replace any existing procedures for handling discrimination complaints.

§ 1900.52 Definitions.

(a) *Appellant.* An appellant is an applicant for FmHA assistance or an FmHA borrower or grantee, either individual or organization, that is directly and adversely affected by an administrative decision by FmHA.

(b) *Directly and adversely affected.* The term "directly and adversely affected" includes having a request for FmHA assistance denied in whole or in part or having FmHA assistance reduced, cancelled, or not renewed. The term "directly and adversely affected" does not include actions where persons or organizations are clearly not eligible such as in the examples cited in § 1900.53. FmHA officials may not deny or delay approved assistance pending the outcome of appeal of a partial adverse action.

(c) *Hearing.* A hearing, as used in this Subpart, is an informal proceeding at which an appeal from an adverse decision is heard.

(d) *Hearing officer.* The hearing officer has the authority to uphold or reverse decisions and will be:

(1) In the case of an appeal of an initial decision by a County Supervisor, the District Director having jurisdiction over that County Office. If that District Director has a significant role in the initial determination, the District Director from a nearby District Office will be designated by the State Director. The term "significant role" does not include routine supervision by the District Director.

(2) In the case of an appeal of an initial decision by the County Committee, the State Director or Acting State Director. The State Director may designate a State Office program chief, or other State Office official, including a District Director, to conduct the hearing, acting for the State Director, provided that the designee has had no significant role in the decision.

(3) In the case of an appeal of an initial decision by a District Director, the State Director, who may designate a program chief or other State Office official to be the hearing officer.

(4) In the case of an appeal of an initial decision by a State Director, the appropriate Program Assistant Administrator or designee.

(5) In the case of a decision to foreclose an account:

(i) For accounts serviced in County Offices, a District Director from a nearby district.

(ii) For accounts serviced in District Offices, the appropriate Program Assistant Administrator or designee.

(6) In the case of an appeal of an initial decision by a Division Director or an Assistant Administrator, the appropriate Deputy Administrator or designee.

(7) For any decision not directly covered in paragraphs (d) (1) through (6) of this section, the person in the next highest level of FmHA authority, or the designee of that person.

(e) *Record.* The term "record" means the FmHA file, papers filed by an appellant, notes, tapes, or transcript (if any) of a hearing, and decisions made by FmHA.

(f) *Review officer.* The review officer has the authority to uphold or reverse the decision of the hearing officer. Regardless of the level of the decision maker and hearing officer, there will only be one review made in the National Office. However, the review provided for in § 1900.58 (c)(6), and (e) will always be available except where the Administrator is the review officer. When the hearing officer is:

(1) The District Director, the review officer will be the State Director or designee, except that, when a decision to foreclose is appealed, the review officer will be the appropriate Assistant Administrator or designee;

(2) The State Director or designee, the review officer will be the appropriate Assistant Administrator or designee;

(3) The Program Assistant Administrator or designee, the review officer will be the Administrator, or designee.

(g) *District Director.* Wherever the term "District Director" is used, it will also include Assistant District Director.

(h) *Decision maker.* The FmHA official who actually makes the specific decision. For example, if a State Director reviews a preapplication from an organization and directs a District Director to include specific items in Form AD 622, "Notice of Preapplication Review Action," the State Director is the decision maker. However, when the State Director or designee serves only in an advisory capacity in interpreting instructions, policies, and technical items and is not significantly involved in the decision, the District Director will be considered the decision maker. Additionally, when State

Directors refer questions of interpretation to the National Office, and National Office officials act only in an advisory capacity, the State Director will be considered the decision maker.

(i) *Stayed assistance.* The act by FmHA of maintaining assistance at a current or present level, instead of reducing or terminating it pending the outcome of an appeal.

(j) *Official positions.* The terms "County Supervisor" and "District Director" may vary in a few geographical areas. These terms will also mean Assistant Area Loan Specialist and Area Loan Specialist, respectively, in Alaska.

§ 1900.53 Decisions which are not appealable.

(a) FmHA decisions based solely on a limitation of law, or solely and directly on objective standards that are included in published regulations may not be appealed. Examples of these include:

(1) Denial of a Section 504 grant to an applicant less than 62 years of age.

(2) Denial of a loan and/or grant when a city or town to be served has a population in excess of published limits.

(3) Denial of a loan and/or grant to an organization not identified as an eligible applicant by the regulations.

(4) Applications for emergency loans not filed before a prescribed termination date.

(5) Decision not to release basic security for unauthorized purposes.

(6) Denial of a loan because of confirmed income that is above FmHA published limits.

(7) Interest credit reduction that is the result of a confirmed income increase.

(8) A determination of ineligibility for emergency loans based on confirmation or verification by the Agricultural Stabilization and Conservation Service (ASCS) or the Federal Crop Insurance Corporation (FCIC) that the applicant did not have the required production losses of 20 percent or more.

(9) A finding that a cooperative, corporation or partnership applying for an economic emergency loan is not eligible when it has been *confirmed* that less than 50 percent of such applicant's total income is from farming.

(10) Denial of compensation for construction defects when it has been determined that the contractor is willing and able to correct the deficiencies.

(11) Requirements and conditions designated by law to be developed by agencies other than FmHA. They include, but are not limited to: Davis-Bacon wage rates; flood plain determinations; and archaeological and historical areas preservation requirements.

(12) Property standards. An appeal may only be made when the appellant claims FmHA is misapplying the written standards.

(13) Appraisals of property value. (See § 1900.54)

(14) Interest rates as set forth in FmHA procedure.

(15) A rent increase rejection when the borrower fails or refuses to apply for rental assistance in accordance with Exhibit C of Subpart C of Part 1930 of this chapter.

(b) A new application or request for FmHA assistance, when an adverse decision has been appealed and upheld, and when the applicant provides no new supportive information or substantative change, may not be appealed.

§ 1900.54 Review of appraisals.

Appraisals of property value are not appealable. When a loan is not made because the appraisal did not justify the amount requested, the applicant will be notified and advised that a request may be made for a review of the appraisal by the State Director. When a request is made the State Director will review the specific appraisal documents and, when warranted and deemed necessary, send a representative to make an on site review.

§ 1900.55 FmHA actions to limit hearings.

Formal appeals and hearings are time consuming and actions are to be taken to avoid them whenever possible, but without jeopardizing the rights of the appellant. The following procedure should be utilized to minimize the number of appeals.

(a) FmHA personnel should carefully check the accuracy of any adverse actions to be taken.

(b) The reasons for adverse actions should be clearly explained when the applicant or borrower is notified. Vague reasons such as "you lack repayment ability" should be avoided and the applicant or borrower specifically advised why they lack repayment ability.

(c) Affected parties will be required to meet with the decision maker before they request a hearing.

§ 1900.56 Appeal from an initial FmHA decision.

(a) If an applicant for FmHA assistance, an FmHA borrower, or an FmHA grantee is directly and adversely affected by an FmHA decision or action, the official taking such action or making the decision will inform that person or organization by letter of the action taken within 15 calendar days of such action. The letter will be similar in form and content to Exhibit B of this subpart, or Exhibit C in the case of actions not appealable in accordance with § 1900.53 of this subpart, and will include the following:

(1) A statement of the action taken or decision made and all of the specific reason(s) for so doing.

(2) An invitation to call at the decision-making official's office, which may include a meeting with the County Committee, to discuss the decision with that official and to obtain information on appeal rights. The person (or organization) may bring to the meeting any additional information or a representative, including an attorney. (Whenever an appellant utilizes the services of a representative FmHA will provide that representative with copies of all notices and correspondence directly related to the appeal.)

(3) A statement that if the appellant wishes the services of an attorney and does not have one, the name and address of the nearest legal services representative and any known legal referral assistance will be furnished upon request.

(4) When the FmHA actions are appealable, as statement that the person or organization is entitled to a hearing in the event the meeting with the decision maker does not satisfactorily resolve their differences. The letter will state that:

(i) Requests for a meeting with the decision maker must be made within 15 days of the notification.

(ii) When not satisfied with the results of the meeting, the person or organization may appeal directly to the hearing officer. The appeal must be made within 15 days of the notification of the results of the meeting. An additional 30 days may be granted when circumstances clearly warrant the extension.

(iii) The name, title, address, and telephone number of the hearing officer.

(iv) A statement that they should provide the hearing officer and/or bring to the hearing, any evidence supporting their claim.

(v) A statement that if the person (or organization) wants the terminated or reduced assistance maintained at the existing level, the decision to reduce or terminate may be stayed pending appeal if requested by the person (or organization). The appellant will agree to repay any assistance received during the stay for which the appellant is, upon completion of the appeal, determined to have been ineligible.

(vi) When an appeal from a foreclosure action is instituted and includes appeal of corollary matters such as denial of moratorium or interest credits, the letter will include a statement that all matters are merged into a single appeal.

(vii) In acceleration notices, the statement shall read substantially as found in the "Notice of Acceleration" Exhibit C to Subpart A of Part 1955 of this chapter. The term "hearing" will be used in lieu of "meeting" in the "Notice of Acceleration."

(b) When the person or organization takes the opportunity for a meeting with the decision-making official and the meeting results in a resolution of the problem, the official will send the person or organization a letter within 7 days setting forth the resolution and all of the reasons for it. If the meeting does not result in granting the request or a part of the request the letter will

restate the person or organization's right to a hearing, and provide the name, title, address, and telephone number of the hearing officer. The letter will require that such hearing requests be made within 15 days of notification.

(c) If a request is received to stay the decision, the hearing officer, based on the facts and circumstances, will stay the decision. An appropriate case for a stay would be if not to grant the stay would make an appeal useless.

(d) When an appellant appeals a decision and requests a hearing, the appeal will be handled as follows:

(1) Upon the receipt of the request for a hearing, the hearing officer will request the entire file from the decision-making official.

(2) The hearing officer will arrange for a hearing to be held as soon as possible but within 30 calendar days of the receipt of the request for a hearing. The hearing will be held at a location convenient to the appellant, decision-making official and hearing officer. If no such place can be agreed on, the hearing officer will select the location. The hearing officer, after reviewing the file, will return it to the office of the decision-maker so that it will be available to the appellant or representative. If the appellant or the decision-maker for good reason is unable to attend a hearing within the 30 calendar day period, the hearing officer, after considering the circumstances, will reschedule the hearing within 15 days of the original hearing date. The 15 day extension may only be exceeded for verified medical reasons, or other good cause as agreed to by FmHA.

(3) Failure to appear.

(i) If the appellant or appellant's representative, without reasonable cause, fails to appear at the hearing, the appellant's appeal will be deemed to have been concluded.

(ii) If the failure to appear is with reasonable cause and the appellant can demonstrate inability to notify FmHA, the hearing officer will reschedule the hearing at a time convenient to all interested parties, but usually not later than 15 days after the initially scheduled date.

(e) Cases originating in Samoa, Guam and the Western Pacific Territories and submitted to the Hawaii State Office for a hearing, may be acted upon without a meeting between the appellant and the hearing officer when circumstances due to travel and time involved preclude having such a meeting. In such cases the decision-maker must obtain and mail to the hearing officer the complete FmHA file for the case together with any available documents from the appellant supporting their allegations, and statements from other witnesses who would have appeared at the hearing.

(f) When interest rates change during an appeal involving a loan application, and the decision is reversed or modified, the final rate shall be the one most favorable to the appellant if authorized by statute.

(g) Whenever a preliminary review of the file by the hearing officer clearly indicates that the decision will be reversed, the hearing officer will make that decision, notify all involved parties of the reasons, and cancel the hearing.

§ 1900.57 Hearings.

(a) The hearing will be an informal proceeding at which the appellant will bear the burden of proving the initial decision erroneous. To do so the appellant may provide any information or witnesses the appellant believes should be considered in reaching a proper decision. The appellant may present evidence, witnesses, and arguments in support of appellant's complaint, controvert evidence relied on by FmHA, and question all witnesses. Any evidence may be received by the hearing officer without regard to whether that evidence could be employed in judicial proceedings. A suggested guide for the order of presentation at a hearing is included in Exhibit A to this subpart.

(b) The decision making official (or successor) or delegate will be at the hearing and will present evidence if necessary. Any other witnesses or FmHA personnel the decision making official thinks necessary to fully determine the matter will be at the hearing to present evidence.

(c) The hearing officer may request additional witnesses to appear or request further information if in the hearing officer's opinion such is necessary to reach a proper decision.

(d) Before the hearing, the appellant or appellant's representative, may examine, and copy at no cost to the appellant, all relevant documents, records, and regulations of FmHA normally releasable under the provisions of the Freedom of Information Act and the Privacy Act.

(e) If any new evidence or reasons for adverse action will be presented by FmHA, it should be provided to the appellant at least 3 working days before the hearing, or sooner when such information becomes known and available to FmHA.

(f) Hearing record:

(1) FmHA will tape record all hearings, but will use the tapes as a back up to support the outline notes as the official record.

(i) The appellant may tape record the proceedings at their own expense or may obtain a copy for the cost of reproduction. FmHA must notify the other party when the taping begins.

(ii) The taking of transcripts is neither required nor prohibited. Either party may arrange to have a transcript of the hearing made at their own expense. When one party has a transcript made the other will make their own arrangements to obtain a copy. Ordinarily FmHA will not have transcripts made. Prior approval of the Administrator is required when transcripts are made or copied for FmHA.

(2) An FmHA employee (not the decision maker) will take notes at the hearing. The hearing officer may take the notes or assign this responsibility to another FmHA employee. Hearing officers will, in the interest of efficient use of agency staff time, give first consideration to taking their own notes.

(3) The notes will *informally reflect* the essential positions, pertinent information presented, and comments made by both parties, *may be in outline form*, and *need not repeat proceedings* verbatim. They will indicate if the appellant arranged for a transcript.

(4) A typed copy of the notes will be provided to the appellant within 15 days of the hearing. The appellant will notify FmHA of any changes the appellant thinks should be made within 7 days of receipt of the copy. This period of time may be extended an additional 7 days by FmHA upon the request of the applicant. The suggested changes will be made part of the record even if not agreed to by FmHA.

(5) File documents and other written materials used in the hearing will be included as part of the FmHA record.

(g) For good cause, the hearing officer on the request of either the appellant or an FmHA official may, at the hearing officer's complete discretion, continue the hearing to a future time.

(h) *The decision of the hearing officer* shall be based on facts presented at the hearing, appropriate FmHA files, applicable statutes and regulations, and the hearing officer's general knowledge of FmHA program functions.

(i) Within 30 days of the hearing, the hearing officer will determine what action to take with regard to the appeal, unless FmHA has ordered a transcript in which case the decision will be made within 15 days of receipt of the transcript. Hearing officers will make their decision in less time when possible.

(j) If the initial decision is reversed, the hearing officer will inform the appellant and original decision making official by letter of the decision, the reason for it, and what action will be taken. The State Director or Acting State Director must sign the letter on County Committee decision reversals regardless of who conducts the hearing for the State Director.

§ 1900.58 Additional appeals.

(a) If the initial decision is upheld or modified but not reversed, the hearing officer will inform the appellant by letter of the decision giving specific reasons, with a copy to the decision making official. The letter must contain the following statement:

"If you wish to have the above decision further reviewed, you may appeal in writing to (*review officer/address*) within 20 calendar days of the date of this letter explaining why you believe the decision is incorrect. Since this review will be based on the record, including papers filed, FmHA files,

notes, or transcripts of the appeal meeting, my decision, applicable statutes and regulations, and any *additional written* information you wish to submit, you should include any additional information you think is important and indicate whether you wish to present any information in person. The right to present information in person is limited to a meeting and is not to be construed as another hearing."

(b) If the appellant does not request in writing a review of the hearing officer's decision within the 20 calendar day period provided in the letter, the appeal will be considered concluded.

(c) If the appellant appeals to the review officer:

(1) Upon receipt of the appeal the review officer will request that the hearing officer forward the record to the review officer. The hearing officer will promptly do so.

(2) With prior approval of the Administrator the review officer may obtain a copy of the transcript of the hearing if one was arranged for by the appellant.

(3) If no personal meeting was requested by the appellant, the review officer will review the record on the case and applicable law and regulations, any additional information furnished by the appellant, and such additional information as the review officer deems necessary and render a decision within 30 calendar days of receipt of the appeal.

(4) If the appellant indicates a desire to present information in person, the review officer will arrange a meeting for the sole purpose of receiving such additional information. The meeting will be held within 15 calendar days of receipt of the appeal and at the offices of the review official. A final decision will be rendered within 20 calendar days after the meeting.

(5) If the decision of the hearing officer is reversed, the appellant will be informed by letter of the decision and what action will be taken. The decision-making official and the hearing officer will also be notified, with the reasons for reversal provided.

(6) If the hearing officer's decision is upheld or modified but not completely reversed, the appellant will be informed of the decision by letter giving the specific reasons for the decision, with a copy each to the decision making official and hearing officer. The letter must contain the following statement:

If you believe the above decision is arbitrary and capricious, that it is lacking any rational, factual, or legal basis, or is contrary to FmHA regulations, you may write the Administrator, FmHA, 14th and Independence Avenue, SW., Washington, D.C. 20250, within 30 days, explaining why. The Administrator's review will be based only on the existing written record. A copy of your letter to the Administrator should be sent to me so that I can expeditiously forward the record to the Administrator.

(d) If a letter appealing the decision of the review officer is not received within 30 days, the appeal will be concluded.

(e) Upon receipt of an appeal from a review officer's decision, the Administrator or a delegate will review the record, which will have been forwarded by the review officer upon receipt of a copy of the letter, and determine whether the decision was arbitrary and capricious or contrary to FmHA regulations. If not, the decision will be upheld and the appellant so notified. If the Administrator or a delegate finds the decision to have been arbitrary and capricious, or contrary to FmHA regulations, the official will determine what action should be taken and notify all affected parties.

§ 1900.59 Effect of appeal decision.

(a) *Effective date.* When an appeal is concluded, the effective date of the action to be taken will be the date of the initial decision from which the appeal was taken. Regulations in effect on the effective date will govern the action unless those requirements would not be authorized under statutory or case law at the time the appeal is concluded. Effective interest rates are covered in § 1900.56(f).

(b) *Legal effect.* When an appeal is concluded the decision will be administratively conclusive. The decision will not, however, be determinative of the legality of the action to be taken.

§ 1900.60 Reporting requirements.

(a) A record will be maintained for all cases appealed. The record will consist of the following:

(1) Form FmHA 1900-2, "Appeal Record." This completed form will follow each appeal through final action.

(2) Copies of decision letters by the hearing officer and/or review officer will be attached to Form FmHA 1900-2.

(3) The hearing outline notes will also be attached to Form FmHA 1900-2.

(b) The original appeal record will be maintained in the applicable case folder.

(c) Copies of the appeal record for cases handled at the State Office level and below will be transmitted to and filed in the State Office where the appropriate information will be assembled for the computer entry. The Management Information Systems Division (MISD) will maintain files on appeals in the National Office and will assemble information for computer entry.

(d) Summary reports listing the number and type of appeals and disposition will be submitted semi-annually to the MISD in the National Office on Form FmHA 1900-1, "Semi-annual Report on Appeals." County and District Offices will submit their report to the State Office by the tenth of April and October. State Offices will prepare consolidated State reports which will be transmitted to the National Office by the twentieth of April and October.

§§ 1900.61-1900.100 [Reserved]

[FmHA Instruction 1900-B]

EXHIBIT A—GUIDE TO CONDUCTING A HEARING

A. Obtain the FmHA file from the decision-maker and retain the file. After reviewing the file the hearing officer will return it to the decision maker so that it may be available to the appellant or representative.

B. Arrange a hearing within 30 calendar days of receipt of the notice of appeal at a place convenient to the appellant, decision-making official, and hearing officer.

C. Ensure that appellant sees and is able to photocopy the FmHA file if appellant so requests before the hearing.

1. Concern here should be that if the appellant requests an opportunity to see the file that every document (unless privileged) which may be used in making the decision will be made available to the appellant.

2. This is necessary to give the appellant an adequate opportunity to rebut the evidence that might be against the appellant.

D. Be an unbiased presiding officer.

1. The hearing officer is not representing FmHA or the decision-maker, nor is the hearing officer an advocate for the initial decision.

2. The hearing officer should have no preconceived opinions concerning the issues.

3. To preserve this unbiased atmosphere—

a. The hearing should be held someplace other than the hearing officer's office or office of any FmHA official. The latter may not be possible, but an attempt should be made to hold the hearing at a neutral place.

b. The hearing officer should not fraternize with the decision-maker or other FmHA personnel in the presence of the appellant before or after the hearing. This can be accomplished by having the hearing officer seated separate from the others at the hearing.

E. Conduct an informal proceeding.

1. At this informal proceeding the appellant will bear the burden of proving the initial decision erroneous.

2. The hearing officer may receive evidence without regard to whether that evidence could be employed in judicial proceedings.

3. However the hearing must be conducted in a manner to get facts on the record. Therefore, the hearing must deal in facts and not opinions.

4. The hearing officer should keep control over the hearing and not allow any of the participants, including counsel for the appellant or the decision-maker, to unduly attempt to set the tone of the hearing.

5. As a fact-finder, the hearing officer may question any witness, request additional witnesses to appear, and/or request further information if this information is necessary to reach a proper decision. If the hearing officer is going to request additional witnesses, these witnesses should be given adequate notice along with the time and place of the hearing.

F. Order of presentation. The order listed below should be followed:

1. Opening statement by appellant setting forth why original decision was erroneous. This is an outline of how appellant plans to proceed.

2. Opening statement by decision-maker to show why decision is correct.

3. Appellant presents evidence including documents, witnesses, and arguments supporting their position. The decision-maker can be questioned at this time by the appellant. Any witnesses presented by the appellant can be questioned by the decision-maker or other Government representative.